YEW WAN DOONG @ YEU WAN DOONG

v.

YEU WAN LEONG

HIGH COURT MALAYA, IPOH
TUAN KANG HWEE GEE JC
[CIVIL SUIT NO. 22-126-93]
7 JUNE 1994

PRACTICE AND PROCEDURE: Order 81 Rules of the High Court 1980 - Specific performance of agreement - Summary judgment - Application to set aside - Fraud - Save the issue of fraud matters raised in application already raised and litigated upon - Whether application barred by res judicata - Whether fraud discoverable but not pleaded in earlier proceedings - Whether application frivolous, vexatious and an abuse of the process - Order 18 r. 19 RHC 1980.

This was an application by the plaintiff to set aside the judgment obtained against him by the defendant under O. 81 RHC 1980 coupled with an application by the defendant to strike out the plaintiff's pleading thereof under O. 18 r. 19 RHC on the grounds that the said pleading, vitiated as it was by *res judicata*, was devoid of any reasonable cause of action and was frivolous, vexatious and an abuse of the process of the Court.

The facts were that in July 1986 the plaintiff entered into an agreement with the defendant for the sale of his undivided share in a piece of land for RM120,000. Pursuant to the agreement the defendant paid the plaintiff RM12,000 in cash and the balance of RM108,000 by two cheques, which the defendant deposited with their common solicitors. The solicitors later learnt, however, that the plaintiff was unwilling to complete the sale and for that reason, had the balance amount refunded to the defendant on 21 July 1987.

On 7 August 1987 the plaintiff filed a civil suit against the defendant to declare the said agreement void on the ground of *non-est factum*, and the defendant, in response, made a counterclaim seeking for specific performance of the agreement. The defendant then applied for summary judgment of his claim and in his affidavit in support the defendant *inter alia* deposed that he had "paid to the parties' solicitors the balance purchase monies amounting to RM108,000 to complete the purchase of the property". The defendant did not however disclose then that the whole of the said RM108,000 had already been refunded to him by the said solicitors. On 26 June 1989, the High Court, unaware of the non-disclosure, granted the application but stayed the order thereof pending disposal of the plaintiff's claim aforesaid.

The defendant, however, took out an application to strike out the plaintiff's claim before the same could be heard by the Court. The application was dismissed by the High Court on 18 December 1989 but was allowed by the Supreme Court on appeal. The plaintiff, having failed in his motion to set aside the said judgment of the Supreme Court, filed the present suit and applied to set aside the judgment which the defendant had obtained against him on 26 June 1989 in the previous proceedings, alleging that the said judgement had been obtained by fraud as the defendant, in applying for specific performance thereof, had falsely sworn that he had "paid the balance of the purchase monies" when in fact the said balance had already been refunded to him at the material time and therefore could not be said to have been paid to the said solicitors.

The main issues were:

(1) Whether in affirming the affidavit aforesaid in the manner he did, the defendant could be said to have committed fraud thereby entitling the plaintiff to set aside the judgment of 26 June 1989.

(2) Whether, irrespective of whether there was fraud or not on the part of the defendant, the plaintiff's action was vitiated by *res judicata* thereby rendering the said action frivolous, vexatious and an abuse of the process of the Court.

Held:

[1] On the facts there could be no doubt that the defendant had failed to present a complete and accurate set of facts in his supporting affidavit by witholding from the plaintiff and the Court the fact that the balance sum was refunded to him which, had it been so disclosed, would have probably availed the plaintiff of additional grounds to defend the defendant's application for specific performance.

[2] As for the application of the plaintiff herein, the law is that as long as his claim discloses some cause of action or some question of law or of fact fit to be decided by the Court, the plaintiff's

pleading, however weak, will not be struck out. In the instant case, whether or not the omission of the vital fact by the defendant in respect of payment of the balance sum tantamounts to fraud is clearly an arguable and triable issue. In the premises it cannot therefore be said that the plaintiff's action herein is frivolous, vexatious or an abuse of the process of the Court.

[3] Notwithstanding the above, from perusal of the pleadings of the parties and the defendant's application for summary judgment for specific performance in the previous proceedings and the order of the Supreme Court, it is clear that the subject matter of this suit i.e the sale and purchase of the land in question, had already been litigated upon by the same parties save that fraud was not an issue as it is now. This being the case, *res judicata* would apply unless the plaintiff could satisfy the Court that evidence of fraud which he is now relying on, is a new discovery of fresh material evidence which he could not, with due diligence, obtain for use in the previous suit.

[4] The facts showed that in the previous suit the plaintiff had been put on notice that the defendant had deposited the balance of the purchase price of RM108,000 as early as 26 June 1987 by the letter of the parties' common solicitors. At the time when he decided to commence the previous suit to declare the agreement void, the plaintiff could be exused if he had not by then discovered that the balance of the purchase price had not been deposited with their solicitors, as the action was founded on *non est factum* and the payment or non-payment of money could hardly be in issue. However, by the time the plaintiff was required to defend the defendant's counter-claim for specific performance and later to oppose the application for summary judgment under O. 81, he ought to have gathered all the necessary evidence to defend the action. In other words the alleged non payment of the balance sum was discoverable by the plaintiff had he acted diligently by making such enquiries as necessary from their common solicitors. In the circumstances *res judicata* must apply to render the suit of the plaintiff unmaintainable, it being frivolous, vexatious and an abuse of the process of the Court.

[Defendant's application allowed. Plaintiff's suit dismissed].

Cases referred to:
Home Office v. Dorset Yatch Co. [1970] AC 1004 HL ***(refd)***
Wentworth v. Rogers (No. 5) 1986 NS WLR 534 ***(refd)***
Othman & Anor. v. Mek [1971] 2 MLJ 214 ***(refd)***
Seng Huat Hang Sdn. Bhd. & Ors. v. Chee Seng & Co. Sdn. Bhd. [1987] 1 MLJ 413 ***(refd)***
Flower v. Lloyd [1978-1979] 10 Ch.D 327 ***(refd)***
Abdul Hamid bin Hj. Rahmat v. Development & Commercial Bank Bhd ***(foll)***
Ladd v. Marshall [1954] 1 WLR 1489 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 81

For the plaintiff - Nga Hock Cheh; M/s. Nga Hock Cheh & Co.
For the defendant - V. Vijayasegaran & Paul Subramaniam; M/s. M.K.C. & Jones

JUDGMENT

Kang Hwee Gee JC:
This is an application under O. 18 r. 19 of the Rules of the High Court to strike out the plaintiff's pleading on grounds that it does not disclose a reasonable cause of action, is frivolous, vexatious and an abuse of the process of the Court by reason that it is *res judicata*.

The brief facts of the case are as follows:

On 24 July 1986 the plaintiff entered into an agreement with the defendant to sell his undivided share in a piece of land held under EMR 9201 in the Mukim of Sitiawan for the sum of RM120,000. The parties engaged Messrs.Ngan and Chen to draw up the sale and purchase agreement and to act as their common solicitors. The defendant paid the plaintiff the total sum of RM12,000 leaving a balance of RM108,000 to be paid on or before 3 July 1987. According to the defendant on 26 June 1987 he paid this sum to Messrs. Ngan and Chen by two cheques which were then banked into their clients' account. On 21 July 1987, however Messrs. Ngan and Chen acting on their own initiative refunded the money back to the defendant allegedly after learning that the plaintiff was unwilling to complete the sale.

On 7 August 1987, the plaintiff filed Civil Suit No. 22-148-87 against the defendant to declare the said agreement null and void on the ground of *non est factum*. The defendant filed his defence and counter claimed against the plaintiff seeking *inter-alia* specific performance of the said agreement. The defendant then applied for

summary judgement under O. 81 of the Rules of the High Court 1980. On 26 June 1989, the Court heard and granted specific performance of the said agreement with costs, but stayed the order until the plaintiff's claim is disposed of.

Before that claim could be heard however, the defendant took out an application to strike out the plaintiff's claim while a third party one Yew Uang Kuh also applied by summons in chambers dated 7 December 1989, to intervene in that suit.

Both the applications were heard together on 18 December 1989, whereby the defendant's application to strike out the plaintiff's claim was dismissed and the intervener's application to intervene was allowed. The defendant then appealed to the Supreme Court which on 25 July 1990, reversed the High Court decision. It allowed the defendant's application to strike out the plaintiff's claim and dismissed the intervener's action with costs. The plaintiff then proceeded to file a Notice of Motion No. 08-36-92 to set aside the Supreme Court judgement (presumably on the same ground of fraud as in this present suit) but the motion was dismissed by the Supreme Court on 1 March 1992.

The plaintiff now files this present suit (C.S.22-126-93) seeking to set aside the judgement obtained against him in the first suit on the ground that the defendant had obtained that judgement by fraud. The fraud and its particulars alleged by the plaintiff in this suit appears in paragraph 7 of the statement of claim as follows:

> Since then it has come to plaintiff's knowledge that the said judgement of 26 June 1989 was in fact obtained by fraud on the defendant's part.
>
> Particulars of fraud
>
> (i) The defendant paid the sum RM108,000 on 26 June 1987 but wrongfully withdrew the same on 21 July without the consent of knowledge of the plaintiff.
> (ii) The defendant fraudently dishonestly and falsely affirmed in para 4 of his affidavit affirmed on 28 October as follows:
>
> I was and am at all material times willing and ready to fulfill my obligations under the said agreement and on 26 June 1987, I paid to the parties' Solicitors Messrs.Ngan & Chen, Advocates & Solicitors of 7th Storey, Wisma Ganda, Jalan Raja Omar. Sitiawan the balance purchase monies amounting to RM108,000 to complete the purchase of the property; I am now shown and produce herewith a true copy of the receipt issued by the said solicitors marked "C".
>
> (iii) Falsely and fraudently exhibiting official receipt No. 00073 of Messrs.Ngan & Chen, Advocates & Solicitors, Sitiawan to show payment of balance purchase price of RM108,000 when no such money was in the custody of the said firm of solicitors.

The allegation of fraud is amplified in the plaintiff's affidavit in reply and further affidavit opposing the defendant's application. In substance the plaintiff claimed that he had no prior notice or knowledge that the defendant had withdrawn the balance of the purchase price at the time the defendant's application for specific performance was heard by the High Court. The withdrawal was only discovered when his own solicitors Messrs.Nga Hock Cheh & Co. made enquiries from the parties' common Solicitors Messrs.Ngan & Chen with regard to the balance of the purchase sum after the Supreme Court appeal for the purpose of giving effect to the Supreme Court order to complete the sale in favor of the defendant.

In order to comprehend the substance of the plaintiff's case it is necessary to quote in extentso the contents of the relevant letters that led the plaintiff to conclude that fraud had been committed. The first of these letters from Messrs.Nga Hock Cheh & co. to Messrs Ngan & Chen was dated 13 May 1991 (YD-1) read as follows:

> Dear Sirs,
>
> Re:Lot 9960 Mukim Sitiawan EMR 9201.
>
> We have been instructed by Mr.Yew Wan Doong to act on his behalf in the above matter. We have been instructed by out client to inquire the following:
>
> (1) Whether or not the purchaser Yew Wan Leong has paid the balance purchase price.
> (2) If yes, what amount was paid by the purchaser and when the said amount was paid to your office.
> (3) Where did you deposit or place the balance purchase price paid by the purchaser.
> (4) If the balance purchase price payable by the purchaser was paid into your client's account. When was the same paid into the said account.
> (5) What interests if any has accrued thereon.
> (6) Please furnish certified copy of the pay in slips or fixed deposit receipt.

We have been instructed by our client to stress that he is not questioning your integrity in any manner whatsoever by his foregoing requests. Our client's sole reason is to ascertain whether or not the purchaser has complied with the provisions of the agreement dated 24 July 1986.

Notice is also hereby given to the purchaser that our client is exercising his rights to determine the said agreementas he is entitled to if the answers to paragraph 2 disclose that the purchaser has failed to comply with the provisions of the said agreement. In that event our client requires you to forthwith forward to us the memorandum or transfer executed by him.

We have been further instructed by our client that he is ready and willing to abide by the order of the Supreme Court.

However our client reserves all his legal rights under the said agreement pending your answers to para 2 hereof.

Yours faithfully,

(s.d) Nga Hock Cheh & Co

The reply he received from Messrs.Ngan & Chen by letter dated 18 May 1991 (Ex.YWD-2) was as follows:

Dear Sirs,

Re: EMR No. 9201 Lot No.9960 Mukim Sitiawan

We refer to your letter dated 13 May 1991.

We wish to inform you that the purchaser, Mr. Yew had deposited the balance purchase money of RM108,000 by way of a cheque with us and his instructions to us was to release the payment to your client upon your client's handing over the title deed and the necessary withdrawal of caveat(s) and delivery of vacant possession of the above land to him. However, there was no response from your client until now.

We have now been instructed to bank in the cheque which we have done so on the date hereof. We will forward the balance purchase price to you upon your undertaking as follows:

1. to forward us the original title deed.
2. to forward us the withdrawals of all existing caveat(s)
3. to undertake to refund us the balance purchase price in the event the transfer in favour of our client is not registrable.
4. not to release the balance purchase price until your client delivers vacant possession.
5. to retain the necessary amount for Real Property Gains Tax (if any)
6. to forward us the quit rent receipt for 1991.

Kindly confirm to us whether you can give us the undertaking aforesaid.

Yours faithfully,
(s.d.) Ngan & Chen

c.c.
client.

As the information requested for was not satisfactorily furnished in the reply his solicitors was prompted to write another letter to Messrs. Ngan & Chan on 4 May 1993 (YWD-3) the relevant portion of which read as follows:

Dear Sir,

Re: EMR 9201 Lot 9960 Mukim Sitiawan

We refer to the above matter and our letter 13 May 1991

We have been instructed by our client to require you to furnish the following information:

(1) According to your official receipt No. 00673 of 26 June 1987 a copy of which is annexed herewith for your convenience a sum of RM108,000 was purportedly received from Yew Wan Leong by way of 2 cheques i.e. MBB344789 (RM60,000) and BBMB 000089 (RM48,000).

(a) Please state where you deposit or place the said balance purchase price paid by the said purchaser:
(b) If the said sum who paid into your clients' account;
(c) What interest if any has accrued thereon;
(d) Please furnish certified copy of the pay in slips or faxed deposit receipt:

(2) (a) Did you at any time part custody with the paid sum of RM108,000 or any part thereof,
(b) If yes, when and what amount and to whom.

(3) If you letter of 18 May 1991 you stated that Mr Yew Wan Leong had deposited the balance purchase money of RM108,000 by way of a cheque with you.

(a) Please state the date the new/fresh cheque for RM108,000 was received by you;
(b) Did you pay that cheque into your clients' account;
(c) If yes, when and where

As you were the parties' solicitors at the material time our client requires the requested

information to protect his rights under the agreement dated 24 July 1986.

Please reply on urgent basis. Meanwhile kindly refrain from dealing with the transfer executed by our client.

Yours faithfully,

(s.d.) Nga Hock Cheh & Co.

Messrs. Ngan & Chen replied by letter dated 18 May 1993 (YWD-4) the relevant portion of which read as follows:

Dear Sirs,

Re: EMR 9201 Lot 9660 Mukim Sitiawan

We refer to your letter dated 4 May 1993.

The said two cheques mentioned in your letter were deposited in our client's account with Malayan Banking Berhad, Kg. Koh Branch. The said sum of RM108,000 was refunded to Mr. Yew Wan Leong on 21 July 1987 after we were informed that Mr. Yew Wan Doong had indicated to Mr. Yew Wan Leong that he was not prepared to comply with the sales and purchase agreement.

After the Supreme Court order the balance purchase price of RM108,000 was paid by way of a cheque dated 5 November 1990 and it became stale and redated by Mr. Yew Wan Leong on 5 May 1991. At the moment the said sum is placed with Standard Chartered Bank and the interest accured as at 25 May 1993 was RM16,035.65.

Yours faithfully,

(sd.) Ngan & Chen

From the replies received from Messrs. Ngan & Chen the plaintiff concluded rightly or wrongly that the balance of the purchase price had not in fact been paid by the defendant (on the premise that the said sum had been returned to him on 21 July 1987 by Messrs. Ngan & Chen) at the point of time when the defendant's counterclaim was being heard by the High Court right until the Supreme Court heard and allowed the defendant's appeal. The defendant he contends had therefore falsely sworn paragraph 4 of his affidavit (YWD-5) which he used to support of his application when he deposed that he "paid to the parties' solicitors M/s. Ngan & Chen ... the balance of the purchase monies amounting to RM108,000 to complete the purchase of the property;"

The plaintiff concluded therefore that the order for specific performance obtained by the defendant in the previous Civil Suit No. 22-148-87 which was based on the false affidavit was obtained by fraud. The defendant he contends would not have been entitled to specific performance and the High Court would not have so ordered if the balance of the purchase price had not been paid as this would have infringed clause 6 of the sales and purchase agreement which read as follows:

If for any reason other than by reason of the fault of the vendor, the purchaser shall fail to pay the vendor the balance of the purchase price pursuant to clause 3 hereof on the date as therein provided, this agreement shall *ipso facto* absolutely determine whereupon all the purchaser's rights hereunder shall be at an end and all sums paid by the purchaser to the vendor referred to in clause 2 hereof verbally be forfeited to the vendor who shall be at liberty to resell the said land or otherwise deal with the same.

The grounds upon which the defendant mounts this application appear in his supporting affidavit. Basically they are twofold and could be summarized as follows:

(1) There was absolutely no truth in the plaintiff's allegation that he had sworn a false statement with regard to the payment of the balance of the purchase price of RM108,000. He had paid this sum by two cheques on 26 June 1987 which sums were then banked into the clients' account of the parties solicitors Messrs. Ngan & Chen. The said solicitors however "refunded" the money back to him on 21 July 1987 "as the plaintiff refused to comply with the terms and conditions of the said sale and purchase agreement". This fact is clearly reflected in the letter from Messrs. Ngan & Chen of 18 May 1993 (YUD-4) *supra*. The said payment is also reflected in their earlier letter dated 26 June 1987 (YWL-10) to the plaintiff which read as follows:

Dear Sir,

Re: Sales and purchase agreement dated 24 July 1986 over an undivided 427/1761 share in EMR No. 9201 Lot No. 9960 Mukim of Sitiawan.

We write on the instructions of Mr. Yew Wan Leong of N180, Jalan Raja Omar, Sitiawan, the purchaser of the above land of which you are the vendor under the terms of the sales and purchase agreement dated 24 July 1986 entered into between you of the one part and the purchaser of the other part.

> We wish to inform you that the purchaser has deposited the sum of RM108,000 only being the full balance purchase price of the above land with us in accordance with clause 3 of the said agreement.
>
> We are hereby instructed to give you notice to call at our office to collect the said balance purchase price and to bring along the original title deed to the above land on or before 3 June 1987.
>
> Yours faithfully,
>
> (sd.) Ngan & Chen
>
> c.c.
> Mr. Yew Wan Leong
> N180, Jalan Raja Omar,
> 32000 Sitiawan.

In any case, the defendant contends, whether or not the plaintiff consented to or knew of the refund is irrelevant as the issue in the previous proceeding was the refusal of the plaintiff to comply with the said agreement.

(2) The present action is *res judicata* as the matters raised therein had already been raised and litigated upon in the previous proceeding in Civil Suit No. 22-148-87. The plaintiff is now estopped from raising the new issue of fraud as it should have been raised at the trial, the evidence of which could have been obtained from Messrs. Ngan & Chen at the time of the hearing of the defendant's application for specific performance.

I shall now consider the substance of this application beginning with the first ground.

Before me Counsel for the defendant submitted that there could be no dispute that the defendant paid the balance sum to the parties' solicitors Messrs. Ngan & Chen for the benefit of the plaintiff and that a receipt was issued as this was clearly borne out by the letter of the said solicitor (YWD-4). I would agree with learned Counsel on this point. But in my view there could be no doubt that the defendant had failed to present a complete and accurate set of facts in his supporting affidavit by withholding from the plaintiff and the Court the fact that the balance sum was refunded to him which had it been so disclosed would have probably availed the plaintiff of additional grounds to defend the defendant's application for specific performance. It would appear that what the defendant had stated in his affidavit with regard to the payment was not the whole truth. He was minded to state that he had paid the balance sum but was not prepared to disclose the refund which he accepted and kept. Whether or not the omission of this vital fact by the defendant tantamount to fraud is clearly an arguable and triable issue. As long as the statement of claim discloses some cause of action or some question of law or of fact fit to be decided by the Court, the plaintiff's pleading however weak would not be struck out (see *Home Office v. Dorest Yatch Co.* [1970] AC 1004 HL)

There is however another hurdle in the path of the plaintiff in the second ground i.e. whether *res judicata* applies, which I shall now consider.

Where a judgment has been pronounced between the parties and findings of fact are involved as a basis for that judgment, all the parties affected are precluded from litigating on those facts in any subsequent pleadings. That simply put is basically what is meant by *res judicata*. The rationale for the doctrine is aptly described in the Australian case of *Wentworth v. Rogers (No. 5)* [1986] NS WLR 534 as follows:

> This rule has ancient lineage... It is based upon a number of grounds. There is a public interest in the finality of litigation. Parties ought not by proceedings to impugn a judgment, be permitted to relitigate matters which is the subject of earlier proceedings which gave rise to the judgment. Especially they should not be so permitted, if they move for nothing more than the evidence upon which they have previously failed.

But the principle operates not only to deny parties from raising facts which have been raised in the former proceedings but also facts that ought to have been raised and litigated upon in that proceedings (see *Othman & Anor. v. Mek* [1971] 2 MLJ 214). Hence in *Seng Huat Hang Sdn. Bhd. & Ors. v. Chee Seng & Co. Sdn. Bhd.* [1987] 1 MLJ 413 where the plaintiffs sought to declare the possession orders given by the Magistrates Court null and void on the ground that they were fraudulently procured by material non disclosure of the fact that the defendant had no title to sue for possession, it was held *inter alia* that even if there was fraud on the part of the defendant this was discoverable and could have been exposed by the plaintiffs in the previous proceedings. The plaintiffs' suit was accordingly dismissed. The rationale behind this policy is well illustrated by the words of James LJ in *Flower v. Lloyd* [1978-

1979] 10 Ch. D 327 and approved in *Seng Huat Hang supra* as follows:

> Where is litigation going to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundred of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum*.

In the present suit it is clear from perusal of the pleadings of the parties and the defendant's application for summary judgment for specific performance in the previous proceedings and the order of the Supreme Court (Ex. YWL-8), that the subject matter of this suit i.e. the sale and purchase of the land in question had been litigated upon by the same parties save that fraud was not in issue then as it is now. But *res judicata* would still apply unless the plaintiff could satisfy the Court that the evidence of fraud which he is now relying on is a new discovery of fresh material evidence which he could not with due diligence obtain for use in the previous suit. In *Abdul Hamid bin Hj. Rahmat v. Development and Commercial Bank Bhd.* it was urged that the court apply the test laid down by Denning LJ (as he then was) in *Ladd v. Marshall* [1954] 1 WLR 1489 in considering whether to allow a fresh action as follows:

> To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an importance influence on the result of the case, though it need not be decisive; thirdly the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

The case was however distinguished as one which involved the setting aside at the appellate stage as opposed to one in which the plaintiff commences a fresh action, as in this case. But in my view there is no reason why the same test should not be adopted and applied here. It is to be noted that in the previous suit the plaintiff had been put on notice that the defendant had deposited the balance of the purchase price of RM108,000 as early as 26 June 1987 by the letter of the parties' common solicitors Messrs. Ngan & Chen (Ex. YWL-10) *supra*. At the time when he decided to commence litigation against the defendant to declare the agreement void, i.e. when he filed the previous Civil Suit No. 22-148-87 on 7 August 1987 he could be excused if he had not by then discovered that the balance of the purchase price has not been deposited with their solicitors (assuming this was true). The action was founded on *non est factum* and the payment or non payment of money could hardly be an issue then. But by the time he was required to defend the defendant's counterclaim for specific performance and later to oppose the application for summary judgment under O. 81, he would reasonably be expected to have gathered all the necessary evidence (of which the payment or non payment of the balance sum would be of primary and direct relevance) to defend the defendant's action. In other words the alleged non payment of the balance sum was discoverable by the plaintiff had he acted diligently by making such enquiries as necessary from their common solicitors Messrs. Ngan & Chen.

I am therefore constrained to hold that *res judicata* applies in this case the consequence of which would render the present suit frivolous, vexatious and an abuse of the process of the Court and therefore unmaintainable.

Accordingly, I allow the defendant's application and dismiss the plaintiff's suit with costs.